CASE NO. 80-407

Supreme Court, U. S.
FILED
SEP 15 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

1980-1981 TERM

JACK THOMPSON,

PETITIONER-PLAINTIFF

VS.

RAY D. BASS, ETC., ET AL.
DAN H. TURNER, ASSISTANT DIRECTOR,
ALABAMA STATE HIGHWAY DEPARTMENT,

RESPONDENT-DEFENDANT

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION OF JACK THOMPSON FOR WRIT OF CERTIORARI

SUBMITTED BY:

ALVIN T. PRESTWOOD
POST OFFICE BOX 217
MONTGOMERY, ALABAMA 36101
TELEPHONE: 205/832-4120

ATTORNEY OF RECORD FOR
PETITIONER

* * * * * * * * * * * * * * *

OF COUNSEL:

CLAUDE P. ROSSER, JR.

QUESTIONS PRESENTED FOR REVIEW

1. Can a state employee with a legitimate claim of entitlement to continued employment maintain an action for damages to his liberty and property interests under 42 U.S.C. §1983 against his supervisor, for dismissing him without a pretermination hearing, after the employee was reinstated with full back pay upon a posttermination hearing by an independent state administrative board?
2. In an action for damages under 42 U.S.C. §1983 by a permanent state employee against his supervisor, alleging that the supervisor deprived the employee of substantive due process by arbitrarily and capriciously dismissing the employee upon charges that were false and stigmatizing, does the employee have the burden of proving that the supervisor acted with knowledge that the charges were false, or does the supervisor have the burden of proving his actions were taken in good

faith under his qualified immunity defense?

3. In an action for damages under 42 U.S.C. §1983 by a permanent state employee against his supervisor, alleging that the supervisor wrongfully dismissed the employee (a) because the employee exercised rights secured under the FIRST AMENDMENT, or (b) alternatively, arbitrarily and capriciously based upon false charges in violation of the FOURTEENTH AMENDMENT, is the employee entitled to have his FOURTEENTH AMENDMENT claim submitted to the jury even though the evidence is insufficient to establish a claim under the FIRST AMENDMENT theory?

LIST OF PARTIES TO PROCEEDINGS

The only parties to these proceedings at the time of appeal[1/] to the Fifth Circuit Court of Appeals were as follows:

1. Jack Thompson, the petitioner-plaintiff, who before his dismissal, reinstatement, and subsequent resignation was an Airplane Pilot II with the Alabama Highway Department.

2. Dan H. Turner, the respondent-defendant, who was the Assistant Director of the Alabama Highway Department at the time of the trial of this cause before a jury in the United States District Court for the Middle District of Alabama.

1/ Several defendants were initially named, but the case went to the jury against only Turner and two others. The jury found for the two other defendants, and returned a verdict in the amount of $20,000 only against Turner. Turner appealed, but the plaintiff did not seek review of any of the judgments in favor of the other defendants.

TABLE OF CONTENTS

	PAGE:
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES TO PROCEEDINGS	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
REFERENCE TO REPORT OF OPINIONS	1
JURISDICTIONAL GROUNDS	1
CONSTITUTIONAL PROVISIONS AND STATUTE WHICH THE CASE INVOLVES	1
STATEMENT OF THE CASE	2
ARGUMENT:	10
Question 1: Damages after posttermination reinstatement.	10
Question 2: The burden of proof.	21
Question 3: The two separate claims.	31
CONCLUSION	34
CERTIFICATE OF SERVICE	35
APPENDIX	36

TABLE OF AUTHORITIES

CASES CITED:	PAGE:
Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 29 L.Ed. 2d 619, 91 S.Ct. 1999 (1971)	13, 17
Bryan v. Jones, 530 F.2d 1210, en banc (5th Cir. 1976), cert. den., 429 U.S. 865, 50 L.Ed. 2d 145, 97 S.Ct. 174 (1976)	24
Bush v. Lucas, _____ U.S. _____, 64 L.Ed. 2d 268 (1980)	18
Bush v. Lucas, 598 F.2d 958, reh. denied, 605 F.2d 554 (5th Cir. 1979)	18
Butz v. Economou, 438 U.S. 478, 57 L.Ed. 2d 895, 98 S.Ct. 2894 (1978)	12, 13, 17, 23
Carlson v. Green, 445 U.S. _____, 64 L.Ed. 2d 15, 100 S.Ct. _____ (1980)	18, 19
Cruz v. Beto, 603 F.2d 1178 (5th Cir. 1979)	25, 28
Davis v. Passman, 442 U.S. 288, 60 L.Ed. 2d 846, 99 S.Ct. 2264 (1979)	17, 19
Douthit v. Jones, 619 F.2d 527 (5th Cir. 1980)	25
Frozen Food Express, Inc. v. U.S., 535 F.2d 877 (5th Cir. 1976)	30

CASES CITED: PAGE:

Gibson v. Berryhill, 411 U.S. 564, 36 L.Ed. 2d 488, 93 S. Ct. 1689 (1973) 18

Givhan v. Western Line Consolidated School District, 439 U.S. 410, 58 L.Ed. 2d 619, 99 S.Ct. 693 (1979) 6, 7, 32

Gomez v. Toledo, _____ U.S. _____, 64 L.Ed. 2d 572, 100 S.Ct. _____ (1980) 13, 15, 16, 17, 22, 23

Gomez v. Toledo, 602 F.2d 1018 (1st Cir. 1979) 15

Mary Carter Paint Co. v. Federal Trade Commission, 333 F.2d 654 (5th Cir. 1964), reversed, 382 U.S. 46, 15 L.Ed. 2d 128, 86 S.Ct. 219 (1965) 29, 30

McCray v. Burrell, 516 F.2d 357, en banc (4th Cir. 1975) 24

McGhee v. Draper, 564 F.2d 902 (10th Cir. 1977) 24

Mobile County Gas District v. Mobile Gas Service Corp., 284 Ala. 664, 227 So.2d 565 (1969) 30

Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274, 50 L.Ed. 2d 471, 97 S.Ct. 568 (1977) 6, 7, 32

CASES CITED: PAGE:

Owen v. City of Independence, _____ U.S. _____, 63 L.Ed. 2d 673, 100 S.Ct. 1398 (1980) 12, 15, 17

Procunier v. Navarette, 434 U.S. 555, 55 L.Ed. 2d 24, 98 S.Ct. 855 (1978) 27

Sala v. County of Suffolk, 604 F.2d 207 (2nd Cir. 1979) 24

Scheuer v. Rhodes, 416 U.S. 232, 40 L.Ed. 2d 90, 94 S.Ct. 1683 (1974) 26

Thompson v. Bass, 616 F.2d 1259 (5th Cir. 1980) 1, 3, 4, 8, 9, 11, 16, 21, 28, 29, 31, 32

Thompson v. Gallagher, 489 F.2d 443 (5th Cir. 1973) 30

U.S. v. Sielaff, 564 F.2d 153 (3rd Cir. 1977) 24

Wood v. Strickland, 420 U.S. 308, 43 L.Ed. 2d 214, 95 S.Ct. 992 (1975) 26

CONSTITUTIONAL PROVISIONS: PAGE:

United States Constitution, First Amendment ii, 1, 5, 6, 31, 32, 33

United States Constitution, Fourteenth Amendment ii, 2, 3, 5, 30

STATUTES CITED:	PAGE:
42 U.S.C. §1983	i, ii, 2, 3, 10
28 U.S.C. §1254(1)	1
28 U.S.C. §1343	3

RULES CITED:	PAGE:
Rules of the Supreme Court of the United States, Rule 17	11, 12, 24, 33, 34

REFERENCE TO REPORT OF OPINIONS

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 616 F.2d 1259 (5th Cir. 1980).

JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 14, 1980. The petitioner filed a timely petition for a rehearing on May 28, 1980, and the Fifth Circuit Court of Appeals denied the rehearing on June 16, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE WHICH THE CASE INVOLVES

UNITED STATES CONSTITUTION, AMENDMENT 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT 14, SECTION 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This action was brought in the United States District Court for the Middle District

of Alabama, Northern Division. Jurisdiction in the court of first instance was posited under 28 U.S.C. §1343, and the action was brought pursuant to 42 U.S.C. §1983.

The petitioner Jack Thompson had held the permanent, nonprobationary position of Airplane Pilot II with the Alabama Highway Department since March 19, 1971.[2] He held such position under a "'legitimate claim of entitlement' to his continued state employment", and thus held a property interest in his employment protectible by the due process clause of the FOURTEENTH AMENDMENT.[3] Thompson served as chief pilot of the Highway Department's aviation section from 1971 until March of 1973, when he was relieved of the duties of chief pilot at the suggestion of the respondent Dan H. Turner, who had become Assistant Highway Director in December of 1972.[4]

2/ Thompson v. Bass, 616 F.2d 1259, 1261 (5th Cir. 1980).
3/ Id., at 1264, 1265.
4/ Id., at 1261, 1262.

By letter dated September 25, 1975, Turner dismissed Thompson from his state merit system position without a pretermination hearing, alleging basically that Thompson lacked the confidence and ability necessary to continue employment as an Airplane Pilot II.[5] Upon an appeal to the Alabama State Personnel Board and at a posttermination hearing before that board, it was determined that Thompson had been wrongfully terminated and he was ordered to be reinstated with full back pay.[6]

After his reinstatement, Thompson was treated differently from the other pilots in his employment, and he resigned for those reasons.[7] Three months after his resignation, Thompson instituted the present action for damages under section 1983 against Turner and four other defendants. The gravamen of the complaint was that the defendants, in-

5/ Id., at 1262, n.3.
6/ Id., at 1262, 1263.
7/ Id., at 1263.

dividually and in concert with each other, had (1) acted to punish Thompson for the exercise of rights secured to him under the FIRST AMENDMENT,[8] and (2) arbitrarily and capriciously deprived Thompson of his property interest in his employment and his liberty interest in his good name and reputation in violation of his substantive due process rights under the FOURTEENTH AMENDMENT.[9]

8/ Thompson had, in November of 1972, revealed to a newspaper reporter certain flight information regarding a state official which was published in the Birmingham News. Id., at 1262.

9/ The amended complaint, upon which the issues were tried before a jury, appears at pages 429-453 of the record on appeal in the Fifth Circuit, and at pages 21-45 of the Appendix on that appeal. The complaint, in alleging facts supporting arbitrary and capricious treatment of the plaintiff, included allegations that no pretermination hearing was afforded and that the plaintiff was not given service ratings required by law to be kept and that were given for all the other pilots employed in the Highway Department. The plaintiff also alleged that his good name and reputation were damaged in the course of his dismissal. The Fifth Circuit panel interpreted these allegations as attempts to support a claim for violations of procedural due process. While the allegation of the failure to provide a pretermination hearing was indeed procedural in nature, this case was not presented to the jury upon the issue of procedural due process. The trial court's oral charge (reproduced in the Appendix to this petition, and also appearing at pages 920-937 of the Record and at pages 750-766 of the Ap-

The trial court's charge to the jury[10/] on October 18, 1976, included both the plaintiff's claims as well as the admonition that the burden of proof was upon the plaintiff, but the form of the verdicts supplied to the jury did not differentiate between the two claims, and only referred to "the issues" collectively. After the case was tried, this Court announced a new weight test for proof in First Amendment cases in Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274, 50 L.Ed. 2d 471, 97 S.Ct. 568 (1977) and in Givhan v. Western Line Consolidated School District, 439 U.S. 410, 58 L.Ed. 2d 619, 99 S.Ct. 693 (1979). Under those decisions, a plaintiff must show that his protected speech played a "substantial" role in the employer's decision to terminate him, and then the employer is entitled to show "by a preponderance of the

---

pendix on the appeal in the Fifth Circuit) does not mention procedural due process.

10/ Id.

evidence that it would have reached the same decision (anyway)...even in the absence of the protected conduct."[11/]

The jury returned a verdict against Turner alone on "the issues" and assessed damages against him at $20,000,[12/] and the district court entered its judgment thereon.[13/] Turner then filed his timely motion for a new trial or for a judgment notwithstanding the verdict,[14/] which motion was denied by the trial court on November 15, 1976.[15/]

11/ 429 U.S. at 287, 50 L.Ed 2d at 484; 439 U.S. at 416, 58 L.Ed 2d at 625. To the extent that the district court could not foresee the adoption of these standards and did not properly charge the jury upon them, the petitioner concedes that the Fifth Circuit should have remanded this case for a new trial with instructions to either correctly charge the First Amendment standards or to grant the directed verdict to the defendant upon the First Amendment theory, and, in either case, allow the case to go to the jury upon the substantive due process claim.

12/ R. 801, App. 774, 5th Cir. Appeal Record, and also reproduced in the Appendix hereto.

13/ R. 804, App. 777, 5th Cir. Appeal Record, and also reproduced in the Appendix hereto.

14/ R. 805, App. 780, 5th Cir. Appeal Record, and also reproduced in the Appendix hereto.

15/ See R. 807, App. 782, 5th Cir. Appeal Record, and also order reproduced in the Appendix hereto.

The United States Court of Appeals reversed the district court without remanding the cause, and held, inter alia:

(1) that the dismissal notice from Turner to Thompson did not meet the minimum requirement of due process, but that because "the posttermination hearing panel reinstated Thompson and awarded him back pay, we find that the constitutional inadequacy of the pretermination proceedings was cured and that Thompson was not entitled to additional relief (damages) based upon these allegations";16/

(2) that even though Thompson was stigmatized by Turner in connection with his dismissal from his employment, "Thompson's allegations show that he received an adequate posttermination hearing after which his reputation was vindicated and Turner reinstated him to his job," and thus that "the constitutional error in the procedures

---

16/ Thompson v. Bass, supra, 516 F.2d, at 1266.

employed by Turner was cured in the subsequent proceedings," and that Thompson was not entitled to damages upon this allegation;[17]

(3) that Thompson failed to prove his substantive due process claim "[b]ecause Thompson did not show that Turner discharged him...for exercising his first amendment rights" since the court apparently conceived that both claims hinged upon proof of the discharge being motivated by a desire to penalize Thompson for the exercise of his First Amendment rights;[18] and

(4) that Turner was entitled to a judgment notwithstanding the verdict on the substantive due process claim because "Thompson did not demonstrate that Turner knew or suspected that the evidence of Thompson's airborne shortcomings was false...."[19]

17/Id., 616 F.2d, at 1266.
18/Id., 616 F.2d, at 1268.
19/Id., 616 F.2d, at 1268.

ARGUMENT

Question 1: Damages after posttermination re instatement.

The Court of Appeals has here held that the petitioner cannot recover damages in a section 1983 action for his dismissal when he admittedly did not receive the constitutionally mandated pretermination protections of due process, and that he also cannot recover damages for the stigmatization of his good name and reputation in his profession in connection with that dismissal. The sole reason given by the Court of Appeals for its decision is that Thompson appealed his dismissal to the independent board provided for that purpose by the State of Alabama and proved that the charges forming the basis for his dismissal were false, thereby retrieving his lost rights and, to that extent, vindicating his reputation.[20/]

20/ It is important to note that Turner played no part in the decision to reinstate Thompson, but it

The Court of Appeals thus reasons that the perpetrator of a civil or constitutional wrong, no matter how grievous, can be spared the consequences of any of his acts by the simple fact that his victim, by the expenditure of his own time, effort, and funds, was able to pull himself back to the position he held before the wrong was committed.

Such a holding qualifies this petition to be granted upon a basis of Supreme Court Rule 17.1(a), providing for consideration on certiorari in cases where "a federal court of appeals...has so far departed from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's power of supervision."

This cause is also reviewable under Rule 17.1(c), which provides for consideration when "a federal court of appeals has de-

---

was "Turner's charges" that Turner was not able to present sufficient evidence to sustain before the Alabama State Personnel Board. Id., 616 F.2d, at 1263.

cided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

In Owen v. City of Independence, _____ U.S._____, 63 L.Ed. 2d 673, 693, 100 S.Ct. 1398 (1980), this Court stated:

> A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees....

The case of Butz v. Economou, 438 U.S. 478, 57 L.Ed. 2d 895, 98 S.Ct. 2894 (1978), was not a section 1983 action, but involved an action for damages for deprivation of the plaintiff's rights under the First and Fifth Amendments to the Constitution. In Butz, the plaintiff had lost rights in administrative hearings which were restored when the administrative orders were vacated by the Court of Appeals for the Second Circuit. 438 U.S. at 481, 57 L.Ed. 2d at 900. Although Butz dealt with the question of official im-

munity, the fact that the plaintiff had regained rights lost was not considered by the court as any sort of deterrent to the maintenance of the action. In fact, in that case the majority opinion observed that "[i]njunctive or declaratory relief is useless to a person who has already been injured," and quoted with approval the following language from Mr. Justice Harlan's concurring opinion in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 410, 29 L.Ed. 2d 619, 91 S.Ct. 1999 (1971):

> For people in Bivens' shoes, it is damages or nothing.

438 U.S. at 504, 505, 57 L.Ed. 2d at 915.

The case of Gomez v. Toledo, _____ U.S. _____, 64 L.Ed. 2d 572, 100 S.Ct. _____ (1980), which was decided on May 27, 1980, just thirteen days after the decision of the Fifth Circuit Court of Appeals in the instant case, presented facts so closely parallel to the facts in this case as to render it almost, but not quite, on all fours. A review of

those facts will demonstrate their similarity:

(1) both Gomez and Thompson were public employees with a right to continued employment absent cause for dismissal;

(2) both made statements of wrongdoing by other officials;

(3) after such statements, the duties of both were changed;

(4) both were dismissed by their supervisors without a pretermination hearing;

(5) both sought to have their dismissals reviewed by independent governmental agencies at posttermination hearings;

(6) both were reinstated by the independent governmental panels;

(7) after reinstatement, Thompson resigned while apparently Gomez stayed on his job, but both sued their supervisors for damages under section 1983, both claiming damages to their reputations.

As will be pointed out later in this petition, this Court in Gomez was dealing with the question of the burden of pleading the good faith, qualified immunity defense and was not directly addressing the question of whether Gomez could recover the damages he sought for the temporary loss of his property interest or for the injury to his liberty interest via the stigmatization of his reputation. However, the First Circuit Court of Appeals had expressed "some doubt as to the allegations of paragraph 17 that his discharge, prior to a hearing, was in violation of the Police Department's own regulations and that his constitutional right to due process was violated." Gomez v. Toledo, 602 F.2d 1018, 1021 (1st Cir 1979). This unanimous Court recognized that doubt and dispelled it by reaffirming the language in Owen v. City of Independence, supra:

> This statute (42 U.S.C. §1983), enacted to aid in "the preservation of human rights" (citations omitted) reflects a congressional judgment that a "damages remedy against the offending party is a

> vital component of any scheme for vindicating cherished constitutional guarantees."

64 L.Ed. 2d at 576.

It is inconceivable that Gomez could now go back to the U. S. District Court for the District of Puerto Rico, prove the allegations of his complaint, overcome the defenses and win a judgment, and then have the First Circuit, as has the Fifth in the instant case, reverse that judgment because "the posttermination panel reinstated [him] and awarded him back pay, [and] we find that the constitutional inadequacy of the pretermination proceedings was cured and that [he] was not entitled to additional relief based on these allegations."21/

Nor is it plausible that a judgment for damages to Gomez's reputation would be reversed under the Fifth Circuit's logic that his "allegations show that he received an adequate posttermination hearing after which

---

21/ Thompson v. Bass, supra, 616 F.2d , at 1266.

his reputation was vindicated" and "that the constitutional error in the procedures...was cured in the subsequent proceedings."[22/]

This petitioner perceives that this Court's concern that a damages remedy is a "vital component of any scheme for vindicating cherished constitutional guarantees"[23/] is equally expressed in cases under section 1983 as those cases brought against federal officials directly under the Constitution under the Bivens and Butz doctrines. In Davis v. Passman, 442 U.S. 228, 248, 60 L.Ed. 2d 846, 864, 99 S.Ct. 2264 (1979) this Court stated that "were Congress to create equally effective alternative remedies, the need for a damages relief (in actions directly under the Constitution) might be obviated." This language led the Fifth Circuit Court of Appeals to hold that a demoted federal em-

---

22/ Id., 616 F.2d, at 1266.
23/ Gomez v. Toledo, supra, 64 L.Ed. 2d, at 576; Owen v. City of Independence, supra, 63 L.Ed. 2d, at 693.

ployee could not bring an action under the Fifth Amendment since he had available to him administrative review opportunities.[24/] See Bush v. Lucas, 598 F.2d 958, reh. denied, 605 F.2d 554 (5th Cir. 1979). In Bush, after the plaintiff had filed his action and several months before the oral argument in the Fifth Circuit, the plaintiff "was adminstratively restored to his original status from the date of the adverse personnel action...." 598 F.2d, at 961. On April 28, 1980, this Court vacated the Fifth Circuit judgment in Bush and remanded the cause for further consideration in light of Carlson v. Green, 445 U.S. _____, 64 L.Ed. 2d 15, 100 S.Ct. _____ (1980). See Bush v. Lucas, _____ U.S. _____, 64 L.Ed. 2d 268 (1980). In Carlson, it was argued that the Federal Tort Claims Act afforded the "equally effective alternative remedy" men-

---

24/ It should here be noted that it is not necessary for a plaintiff to exhaust his state administrative remedies as a prerequisite to suing under 42 U.S. §1983. See Gibson v. Berryhill, 411 U.S. 564, 36 L.Ed. 2d 488, 93 S.Ct. 1689 (1973).

tioned in Passman. This Court held that the constitutional claim for damages is not barred in the absence of special factors counselling hesitation or unless Congress has provided another remedy explicitly replacing direct actions under the Constitution and such other remedy is equally effective. Then this Court enumerated four factors to show that a constitutional suit for damages was more effective than a suit under the Federal Tort Claims Act:

> (1) a damage recovery against individual defendants is a more effective deterrent;
>
> (2) the direct action provides a basis for punitive damages which are "especially appropriate to redress the violation by a government official of a citizen's constitutional rights;"25/

25/ 64 L.Ed. 2d, at 26.

(3) the direct action provides the choice of a trial by jury; and

(4) there is a need for uniformity in the protection of constitutional rights.

Similar logic clearly dictates that the petitioner's resort to redress by the Alabama State Personnel Board, and obtaining the limited relief there available, cannot be said to be anywhere near as equally effective as a section 1983 action for damages against the constitutional wrongdoer.

Question 2: The burden of proof.

The Circuit Court of Appeals has ostensibly placed the entire burden upon the plaintiff to "demonstrate that Turner knew or suspected that the evidence of Thompson's airborne shortcomings was false or that Turner's charges that Thompson was unable to fly safely and confidently was unreasonable."[26/] It has always been the position of this petitioner that he met such burden of proof.[27/] However, it is clear from the decided cases that the

---

26/ Thompson v. Bass, supra, 616 F.2d, at 1268.

27/ The petitioner argued on petition for rehearing in the Court of Appeals that the record revealed at least ten examples showing that Turner arbitrarily and capriciously treated the petitioner. Summarized succinctly, they were: (1) Turner intentionally did not give Thompson service ratings, but provided them for all other pilots; (2) Turner intentionally deprived Thompson of keys which were provided to all other pilots; (3) Turner refused to notify Thompson of pilot meetings, then accused Thompson of being absent from such meetings; (4) Turner's supervisor acknowledged that Turner was treating Thompson unequally with other pilots, and that he gave Turner instructions to treat Thompson equally in the future; (5) Turner accused Thompson of being so incompetent he was endangering the lives of passengers as early as March of 1973, but Turner's

defendant should have sustained the burden of showing that he acted in good faith as a part of his qualified immunity defense. In Gomez v. Toledo, _____ U.S. _____, 64 L.Ed. 2d 572, 578, 100 S.Ct. _____ (1980), this Court resolved the issue of the burden of pleading the defense, and placed such burden squarely

---

supervisor testified that no one reported such danger to him and Turner continued to allow Thompson to fly numerous passengers, including members of the Governor's family, after that time; (6) Turner recklessly accused Thompson of cancelling "numerous" flights due to weather conditions, which flights should not have been cancelled, but Turner could not sustain such charges with evidence and did not know whether other pilots cancelled such flights more frequently than Thompson; (7) Turner alleged that on "several" of such cancelled flights, a pilot with less experience took the assignment, when in fact he knew of only one such occasion, and had not fully investigated that one; (8) Turner required all pilots to remain qualified to fly all aircraft, and knowingly deprived Thompson of the training necessary to qualify himself, but provided that training to the other pilots; (9) when Thompson employed his own instructor in order to retain his qualifications, Turner recklessly accused Thompson of employing the instructor only to aid Thompson in flying the airplane; and (10) Thompson was following instructions to remain at home until called for a flight, and Turner's discharge letter accused Thompson of being absent from work when no flight was scheduled.

upon the defendant, based upon the totally logical reasoning that "whether such immunity has been established depends on facts peculiarly within the knowledge and control of the defendant." Although it seems naturally to follow that such burden should continue to be upon the defendant as to the proof,[28/] Mr. Justice Rehnquist, in his concurring remarks in Gomez, observed that he read the opinion as leaving "open the issue of the burden of persuasion, as opposed to the burden of pleading" the defense of qualified immunity.

Since this Court has left open the question of the burden of proof of the quali-

---

28/ The burden of establishing the more stringent defense of absolute immunity, not involving the issue of good faith, was placed upon the defendant in Butz v. Economou, 438 U.S. 478, 506, 57 L.Ed. 2d 895, 916, 98 S.Ct. 2894 (1978): "officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope."

fied immunity defense, this petition presents a proper case for consideration on certiorari under Rule 17.1(c), of the Rules of the Supreme Court of the United States.[29/]

The Fifth Circuit Court of Appeals has recently addressed this burden of proof issue in several cases. In Bryan v. Jones, 530 F.2d 1210, 1213, en banc, (5th Cir. 1976), cert. den., 429 U.S. 865, 50 L.Ed. 2d 145, 97 S.Ct. 174 (1976), that court, in the case of a defendant acting as a jailer, sweepingly said: "whatever impact his good faith has, it must be as an element of defense." (Emphasis added.)

29/ Several decisions of the Circuit Courts of Appeals have held that the defense of good faith must be established by the proof of the defendant official. See McCray v. Burrell, 516 F.2d 357, en banc (4th Cir. 1975); McGhee v. Draper, 564 F.2d 902 (10th Cir. 1977); U.S. v. Sielaff, 564 F.2d 153 (3rd Cir. 1977). The Second Circuit Court of Appeals, however, recently affirmed a directed verdict for defendant officials because the plaintiff failed to prove the defendants' bad faith. See Sala v. County of Suffolk, 604 F.2d 207 (2nd Cir. 1979).

In Cruz v. Beto, 603 F.2d 1178, 1183 (5th Cir. 1979) the court held that when a former director of the Texas Department of Corrections asserted that "his questioned decisions were made as director of the prison based on what he perceived to be a security need of the institution, the plaintiffs have the burden of piercing his immunity by pleading and proving that he has abused his authority either subjectively or objectively as the standards have been stated."

Douthit v. Jones, 619 F.2d 527 (5th Cir. 1980) was a section 1983 case against a sheriff and his deputy. The court observed that Cruz had held that a state prison department director exercising broad discretion need only prove that he acted in the regular course of discharging his official duties, and that showing shifted the burden of proof to the plaintiff to show that the director had not acted in good faith. The Douthit court, distinguishing the discretionary authorities of such a director

and a jailer, held a jailer to a high standard of reasonableness and that the jailer must establish by proof his good faith defense.

This Court, in Scheuer v. Rhodes, 416 U.S. 232, 247, 40 L.Ed. 2d 90, 103, 94 S.Ct. 1683 (1974), did indicate that there was a "varying scope" of qualified immunity which is "dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." Wood v. Strickland, 420 U.S. 308, 43 L.Ed. 2d 214, 95 S.Ct. 992 (1975), extending qualified immunity to school board officials, referred to the "objective" and "subjective" tests of good faith as follows:

> As we see it, the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students'

daily lives than by the presence of actual malice.

To be entitled to a special exemption from the categorical remedial language of §1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. Such a standard neither imposes an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of § 1983. Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.30/

30/ See, also Procunier v. Navarette, 434 U.S. 555, 55 L.Ed. 2d 24, 98 S.Ct. 855 (1978).

In the instant case, Turner actively sought to get control of the aviation section of the Highway Department. He suggested to the highway director that Thompson be replaced as chief pilot.[31/] Turner was so much in control of the section that the pilot-in-charge testified "I can't make a move without Mr. Turner knowing about it."[32/]

In determining whether Turner was entitled to have his burden of proving his good faith shifted to the plaintiff in this cause, as the Fifth Circuit did in Cruz, it is important to note that the aviation section of the Highway Department only contained five pilots,[33/] and that Turner was very close to the operation of the unit, totally unlike the defendant in Cruz. It is also important to note that Turner's actions against Thompson extended solidly over a two and one-half year period from March of 1973 until Thompson's

---

31/ Thompson v. Bass, supra, 616 F.2d, at 1262.
32/ R. 474, App. 362, 5th Cir. Appeal Record.
33/ R. 447, App. 39, 5th Cir. Appeal Record.

dismissal in September of 1975.[34/] His adverse actions against Thompson continued after Thompson's reinstatement in April of 1976.[35/]

It is the position of the petitioner that when Turner knowingly treated him differently and unequally in comparison with the other pilots, in a manner adverse to Thompson, Turner's actions were arbitrary, capricious, and unreasonable, and that proof, coupled with Thompson's loss of his property interest in his job and his liberty interest in his reputation, was sufficient to sustain his claim of violation of his substantive due process rights. Unequal treatment by government was succinctly described in Mary Carter Paint Co. v. Federal Trade Commission, 333 F.2d 654, 660 (5th Cir. 1964), reversed on other grounds, 382 U.S. 46, 15 L.Ed. 2d 128,

---

34/ Thompson v. Bass, supra, 616 F.2d, at 1262.

35/ Id., 616 F.2d, at 1263.

86 S.Ct. 219 (1965):

> But law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case.[36]

333 F.2d, at 660 (Brown, J., concurring specially.)

In Thompson v. Gallagher, 489 F.2d 443, 447 (5th Cir. 1973), the court said:

> The Fourteenth Amendment stands for the proposition that the government must act, when it acts, in a manner which is neither arbitrary nor unreasonable. ...Public employees are every bit as protected by the Fourteenth Amendment's safeguards as is the rest of the populace.

36/ See, also, Frozen Food Express, Inc. v. U.S. 535 F.2d 877 (5th Cir. 1976). Perhaps the Supreme Court of Alabama best defined arbitrary and unreasonable treatment when it said: "We agree that it is essential that administrative rulings be consistent and that a radical departure from established interpretation and practice cannot be made except for compelling reasons. To act in one manner in one case and in the opposite manner in another case, where the circumstances are the same in all material respects, would be to act arbitrarily or, at best, unreasonably." Mobile County Gas District v. Mobile Gas Service Corp., 284 Ala. 664, 671, 227 So.2d 565 (1969). (Emphasis added.)

Question 3: The two separate claims.

Clearly, the trial court charged the jury on the two separate theories of recovery: (1) that Turner punished Thompson for the exercise of First Amendment rights; and (2) that Turner arbitrarily and capriciously treated Thompson in violation of his rights to due process of law.[37/]

The Court of Appeals seemed to understand the legal difference between the two claims.[38/] There was no question that Thompson received disparate treatment at the hands of Turner, but the only question was whether the treatment resulted from Thompson's exercise of First Amendment rights. The trial judge understood the distinction very well, and when considering a motion for a directed verdict for the defendants on the First

---

37/ The court's oral charge is reproduced in the Appendix hereto, and appears in the record on appeal to the Fifth Circuit at pages 920-937, and in the Appendix on that appeal at pages 750-766.

38/ Thompson v. Bass, supra, 616 F.2d, at 1267, 1268.

Amendment theory, he observed from the bench that, if he granted the motion, "that still leaves your job 1983 lawsuit insofar as the wilfull and wrongful deprivation of his right to a livelihood."[39/]

The petitioner can understand the Court of Appeals' reasoning on the First Amendment theory standing alone. The panel did not believe there was sufficient evidence for the jury to find that the disparate treatment resulted from a desire to punish Thompson for the exercise of First Amendment rights, and the proper Mt. Healthy and Givhan standards were not given in the trial court's oral charge.[40/] However, the arbitrary and unreasonable disparate treatment did not thereby go away. It thus came as a complete shock to the petitioner when the Court of Appeals said:

> Because Thompson did not show that Turner discharged him or conspired to discharge him for

---

39/ R. 577, App. 397, 5th Cir. Appeal Record.
40/ Thompson v. Bass, supra, 616 F.2d, at 1267, 1268.

> exercising his first amendment rights, he also failed to prove his substantive due process claim which like his first amendment claim, was based primarily on his factual allegation that Turner discharged him because he talked to the Birmingham News reporter."

There is nothing in the Court of Appeals opinion or in the record to substantiate that finding. The petitioner's counsel knows of no case where the intertwining of these two issues was so misunderstood by any court. Carried to its extreme, the decision would mean that no recovery for violation of due process rights could ever be had, where there was an alternative allegation of punishment for the exercise of First Amendment rights, unless the plaintiff proved that the constitutional deprivations were substantially motivated by a desire to punish the exercisor of those rights.

Certainly this presented question falls within Rule 17.1(a) of the Rules of this Court in that the Court of Appeals "has so far departed from the accepted and usual

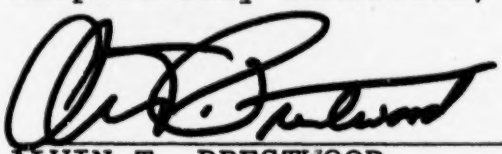
course of judicial proceedings...as to call for an exercise of this Court's power of supervision."

Under these circumstances, the Court of Appeals should, at the very least, have reversed the lower court and remanded the case for a new trial based on the substantive due process claim.

CONCLUSION

It is respectfully requested that this Honorable Court will grant this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in order to review the questions presented for review herein.

Respectfully submitted,



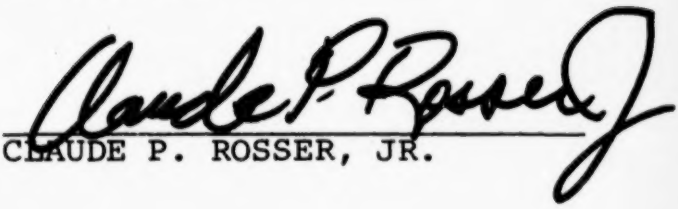
ALVIN T. PRESTWOOD

Post Office Box 217
Montgomery, Alabama 36101
Telephone: 205/832-4120

ATTORNEY OF RECORD FOR PETITIONER

* * * * * * * * * * * * * * * *

OF COUNSEL:



CLAUDE P. ROSSER, JR.

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing petition for a writ of certiorari upon the Honorable Robert S. Lamar, Jr., Counsel of Record for the Respondent-Defendant Dan H. Turner, by delivering them to his office this the 12 day of September, 1980.

ALVIN T. PRESTWOOD

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

1980-1981 TERM

JACK THOMPSON,

PETITIONER-PLAINTIFF

VS.

RAY D. BASS, ETC., ET AL.
DAN H. TURNER, ASSISTANT DIRECTOR,
ALABAMA STATE HIGHWAY DEPARTMENT,

RESPONDENT-DEFENDANT

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

SUBMITTED BY:

ALVIN T. PRESTWOOD
POST OFFICE BOX 217
MONTGOMERY, ALABAMA 36101
TELEPHONE: 205/832-4120

ATTORNEY OF RECORD FOR
PETITIONER

* * * * * * * * * * * * * * *

OF COUNSEL:

CLAUDE P. ROSSER, JR.

INDEX TO APPENDIX

	PAGES
TRIAL COURT'S ORAL CHARGE TO THE JURY GIVEN OCTOBER 18, 1976	A1-24
JURY VERDICT RENDERED OCTOBER 21, 1976	A25
JUDGMENT OF DISTRICT COURT ENTERED OCTOBER 21, 1976	A26-27
MOTION FOR NEW TRIAL AND/OR JUDGMENT NOTWITHSTANDING THE VERDICT FILED OCTOBER 29, 1976	A28-30
ORDER DENYING MOTION FOR A NEW TRIAL AND/OR JUDGMENT NOTWITHSTANDING THE VERDICT ENTERED NOVEMBER 15, 1976	A31
OPINION OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT RENDERED MAY 14, 1980	A32-60
ORDER OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING ENTERED JUNE 16, 1980	A61-62
JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ENTERED MAY 14, 1980, ISSUED AS MANDATE JUNE 24, 1980	A63-64

Charge of the Court

All right, jurors; for the next few minutes, give me your attention. We have reached the point in the trial of this case where it is appropriate that I discuss with you certain legal principles that are controlling in this lawsuit. You need to know what the law of the case is; because once you complete your job of evaluating and judging the evidence and determining what the true facts are in this lawsuit, you take these legal principles, apply them to the facts that you determine to be the true facts, and then, as between the plaintiff on one side and each of the defendants, separately, on the other side, return verdicts.

You jurors are the sole judges of the evidence. You are the sole finders of the facts. It is your responsibility to weigh all of the evidence; give consideration to all of the evidence, both oral testimony that has been given from witnesses who personally appeared here before you and consider the various documents that have been offered in evidence for you to

consider in connection with determining what the true facts are. You are not to single out one instruction of the law as being solely determinative of the law of the case, but consider the instruction as a whole. Consider the instruction as applicable to each defendant, separately; because the fact that the defendants have been jointly tried and a joint accusation has been made in the form of a complaint against them does not mean that they are culpable in the lawsuit jointly, because you determine their culpability separately -- that is, culpability, if any, separately. Each defendant stands upon his own feet insofar as the charges against him are concerned and insofar as his defense is concerned. Unless I otherwise indicate, these legal principles are applicable to each defendant in the lawsuit.

I told you a few minutes ago that you have a duty and responsibility of determining from the evidence what the true facts are. I told you that you are the judges of the evidence, that you have a responsibility to weigh the evidence in the case. I charge you, also,

that you, as jurors in the case, are the sole judges of the credibility of the witnesses who have testified in this case. If you can, accept all of the evidence in the case. If cannot accept all of the evidence, that is, if you cannot reconcile it with the truth of the matter that you determine to exist, then it's your responsibility and it's one of your functions to determine what part of the evidence you are willing to accept and what part of the evidence you must reject. In that connection, I charge you that you are the sole judges of the credibility of the witnesses who have testified in the lawsuit. You should carefully scrutinize the testimony given in this case, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate or which may tend to indicate whether a witness is worthy of belief. Consider each witness's intelligence and motive and state of mind and conduct and demeanor while they appeared here before you and testified; consider, also, any other matters that, in your good judgment and in your common sense,

will help you to accurately and fairly weigh and judge the evidence and accurately and fairly determine the credibility of the witnesses. Consider, also, any relation each witness may bear to either side of the lawsuit, whether a witness has something to gain or something to lose by reason of the verdicts in the case. And then when you have done all of that, you will have exercised your function of fairly and accurately, without any prejudice, without any sympathy, without any preconceived notions, determining what the true facts are in the lawsuit.

At the risk of being unduly repetitive, I am going to briefly summarize for you the contentions of the parties; that is so that you can more readily apply these legal principles to this lawsuit. This is an action brought by Jack Thompson for damages. He claims both actual damages, that is, compensatory damages, and he claims punitive damages, also, that is, damages in the form of punishment. I'll define these and outline the elements of actual and punitive damages for you fuller later in this

charge. Now, the nature of this lawsuit is that it's under a statute passed by the Congress of the United States that reads in substance, part of it: Every person who, under color of any statute or usage of any state or territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law. And this is an action for damages that is brought under that section. Jack Thompson seeks damages against Bass and Turner and Sexton, collectively and individually, for the deprivation of certain rights that he says are guaranteed to him by the Constitution of the United States. One of the rights that he said he was deprived of or punished for exercising was his First Amendment rights, and you have heard the evidence and arguments in that connection. Another that he says that he was deprived of, a constitutional right, was not to be arbitrarily and

maliciously terminated from his tenured employment as a pilot for the State of Alabama.

To these broad contentions, each defendant in this case denies any liability. Each defendant denies that they acted in bad faith, that they acted arbitrarily. The defendants deny that they acted capriciously. The defendants deny doing anything that was not required of them in the exercise of their duties and responsibilities as employees and as officials for the State of Alabama. The defendants deny that they entered into any conspiracy, that they acted collectively at all to violate any of Jack Thompson's constitutional rights. Those are the broad contentions of the parties.

As I told you a few minutes ago, Jack Thompson brings this lawsuit under a statute as passed by the Congress of the United States that gives a civil action for damages when one has been wrongfully deprived of constitutional rights by a state official or by someone acting under color of state law. Congress has the power to enforce provisions of the Constitution of the United States against those who carry a

badge of authority of a state and represent it in some capacity, be it a high capacity or a low capacity, whether they act within their authority or whether they misuse that authority. By this statute, I charge you that Congress intended to give a right of action to parties, to citizens, deprived of constitutional rights, privileges, and immunities by an official's abuse of his authority and by an official's abuse of his position. This statute, the law says, is broad enough to cover an action for an alleged conspiracy to deprive an individual, deprive a citizen, of his civil or of his constitutional rights. One reason for the legislation that was passed was to afford a right in a Federal Court, because, by reason of any prejudice or passion or neglect or intolerance or otherwise, state laws might not be enforced, and the claim that citizens to those rights have insofar as the enjoyment of these rights and privileges and immunities are concerned.

The act charged in this case, the actions charged in this case, the gravamen of the

lawsuit, is a deprivation of a constitutional right under color of law. "Under color of law" means to act under pretense of law. Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is, the law says that is applicable in this case, actions taken under color of state law. It matters not that the state might afford a remedy for an injury suffered by reason of a deprivation of some right, which may have constituted or which did constitute an abuse of power. If a person is clothed with authority by state law, and he misuses this power, and such misuse was made possible only by reason of the fact that he was clothed with authority, then he's acting under color of state law. "Under color of state law" means to act under pretense of law. Acts of officers who undertake to perform their official duties are included, whether they hue to the line of authority or whether they overstep it. The question, then, on this point of the law of the case seems to be was the act a mere private act, or was it done under some pretense

of authority under law? If it was done under pretense or authority of the law, then it was an act under color of state law, within the statute with which we are dealing in this case.

The elements of this lawsuit are: The acts complained of must have been done under color of state law, as I have just outlined and defined for you. Two, the acts complained of must have caused the deprivation of a right, privilege, or immunity secured by the Constitution and laws of the United States. And three, the act complained of or the actions complained of must have caused an injury or damage to the person complaining.

I charge you as a matter of fact that a person does have, under the Constitution of the United States, the right of free speech. No one has a right to deprive a citizen of the United States of that right that is guaranteed under the First Amendment to the Constitution of the United States. I charge you further under the law that there is a constitutional guaranty under the Fourteenth Amendment to the Constitution of the United States that a

citizen will not be deprived of a tenured job by arbitrary and capricious action without due process of law. And the law says you cannot act arbitrarily and capriciously and still act within the due process of the law. Under the Constitution and laws of the United States, a person is guaranteed freedom of speech, guaranteed freedom not to be deprived of a tenured employment -- without due process of law, or, to put it another way, by arbitrary and capricious action.

You have heard the lawyers make reference to and you have heard me make reference to the fact that the plaintiff in this case charges that the defendants acted pursuant to a conspiracy. The plaintiff also charges that the defendants acted separately and individually. So there are two thrusts to his charge insofar as how they acted, whether it be separately or whether it be pursuant to a conspiracy. One of the charges is, as I stated a few minutes ago, that the defendants entered into a conspiracy to deprive him of his constitutional rights. The other is that they acted individually for

that purpose.

You need to know what the law of conspiracy is. A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose or to accomplish a lawful purpose bv unlawful means. Now, the gist of the offense is a combination or agreement to violate or to disregard the law. The law says that mere similarity of conduct among various persons and the fact that they may have associated with each other and may have discussed common aims and common interests does not necessarily establish the proof of a conspiracy; however, the evidence need not show that the members entered into any express or formal agreement or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be or the details thereof. What the evidence must show, in order to establish proof that a conspiracy existed, is that the members in some way or some manner or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and an

unlawful plan. The law says that a person may become a member of a conspiracy that is already in existence without full knowledge of all the details of it. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers an object or purpose of the conspiracy, does not thereby become a co-conspirator. Now, before a juror may find that either of the defendants, Bass, Turner, or Sexton, or any other person became a member of a conspiracy, the evidence must show that the conspiracy was formed and that the defendant or other person who is claimed to have been a member of the conspiracy knowingly and willfully participated in the unlawful plan with intent to advance or further some object or further some purpose of the conspiracy. To participate knowingly and willfully means to participate voluntarily and understandingly and with a specific intent to do what the law forbids or with a specific intent to fail to do what the law requires. One who knowingly and willfully joins an existing conspiracy is charged with the same responsibility as if he

had been one of the instigators or originators of the conspiracy. Now, in determining whether or not a defendant or any other person was a member of a conspiracy, you jurors are not to consider what others may have said or done. That is to say, the membership of a defendant in this case, either Bass or Sexton or Turner, must be established by evidence as to his own conduct, what he, himself, said or did. If and when it appears from the evidence that a conspiracy did exist to deprive Jack Thompson of one or more of his constitutional rights, as those rights have been defined for you in this charge -- if and when it appears from the evidence that a conspiracy did exist and that a defendant was one of the members, then the acts thereafter knowingly done and the statements thereafter knowingly made by any person likewise found to be a member of the conspiracy may be considered by you jurors as evidence in the case as to the defendant, each defendant, found to have been a member of the conspiracy, even though the acts and statements may have occurred in the absence and without the knowledge of the

defendant, provided -- and this is a caveat -- provided such acts and statements were knowingly done and made during the continuance of the conspiracy and were knowingly done and made in furtherance of one or more objects of the conspiracy. Otherwise, the law says, any evidence that you find to be of an incriminating nature -- not in a criminal sense, but in the sense that civil liability is sought to be attached in this case -- made outside of court by one person may not be considered as evidence against any person who was not present and heard the statement made.

In summary on the law of conspiracy: The evidence must establish that the conspiracy described was formed and existing at or about the time alleged and that one or more of the defendants knowingly and willfully became a member of the conspiracy; that one of the conspirators thereafter knowingly committed at least one of the overt acts -- as opposed to thinking something, that is doing something -- designed to further some object or purpose of the conspiracy.

As I told you a few minutes ago, conspiracy is one of the theories that the plaintiff advances in support of his case. The other is that the defendants acted separately, maliciously and capriciously, to deprive him of his tenured employment as a Pilot II for the State of Alabama.

The defendant, Bass, advances a defense that is unique insofar as Bass is concerned. I don't mean that it is a unique defense, but he is the only one in the case that advances this defense. And that is that he was acting as a supervisor and that he relied upon statements and recommendations made by people that were working under him.

On that point, and before I get to the details of the law on that point, I charge you that the defendants in this case cannot be held civilly liable in this lawsuit if they acted reasonably. They cannot be held liable in this lawsuit if they acted in good faith in the performance of their duties. The law is that a public official, including employees who are also in the sense that we are dealing with

today public officials -- a public official is not responsible for the misfeasance or the nonfeasance of duty of his agents or servants properly employed by or under him. I give you this charge insofar as the defendant, Bass, is concerned. Bass is not responsible for any illegal conduct on the part of Sexton or any illegal conduct on the part of Turner, if there was any such conduct on the part of either Sexton or Turner. He's not responsible for their illegal conduct in this case in either depriving Jack Thompson of his First Amendment rights or depriving him of his Fourteenth Amendment rights as long -- he is not responsible for their conduct as long as Bass does not personally direct or otherwise personally participate in any wrongful conduct of his subordinates. If he personally directs it or if he personally participates in it, then he's just as culpable as the employees are who work under him. A public official or public employee is responsible, the law says, and he is liable for civil damages if one of his official duties is to supervise, train, or control

his subordinates and if he willfully and in bad faith fails to reasonably fulfill his duty in that regard. And so getting back to it; there is no liability on either of the defendants, either Bass or Turner or Sexton, in this case if the evidence reflects that they acted reasonably, if they acted in good faith in the performance of their duty.

If you find that there was not conduct on the part of the defendant, Bass or Sexton or Turner, that violated constitutional rights of the plaintiff, Jack Thompson, then that ends the case; you will return verdicts, separate verdicts, for each of the defendants. The form of your verdict will read, in substance, "We the jury find the issues in favor of the defendant, Jack Thompson" [sic] -- or, "in favor of the defendant, Ray D. Bass or Mitchell Sexton or Dan H. Turner, " separate verdicts. On the other hand, if you find that one or more of the defendants are guilty, as I have defined the law for you, of violating plaintiff, Jack Thompson's, constitutional rights and that Jack Thompson was proximately injured and damaged by

reason of that, then you will return a verdict in favor of Jack Thompson and against one, two, or all three of the defendants. In that event, the form of your verdict will read, "We the jury find the issues in favor of the plaintiff, and we assess his damages at blank dollars," and you insert the amount.

I told you initially when I started discussing the legal principles of this case with you that plaintiff sues for actual damages, and he sues for compensatory damages.

Compensatory damages are those damages which may have been, according to the evidence in the case, suffered by the plaintiff as a proximate consequence of the alleged wrongful actions and conduct of the defendants. Compensatory damages to be awarded, if any, in this case include loss of salary, loss of -- to his reputation, the actual expenses reasonably and necessarily incurred in being reinstated to his state job, loss of income or retirement benefits or privileges, both past and prospective. The term, "compensatory damages," intends a recompense for some loss or a recompense for

some service, a reimbursement, if you please, for loss suffered by reason of injury to person or property. Compensatory damages are awarded from a sense of natural justice and are designed to repair that which one has been deprived by the wrong of another or by the wrong of others.

Punitive damages are also claimed. Punitive damages are those damages which the law says may be awarded by way of punishing a wrongdoer who has acted willfully and maliciously. Punitive damages cannot be awarded against either of the defendants in this case unless you first find that their conduct in depriving Jack Thompson of one or more of his constitutional rights was conduct taken in a willful and malicious manner. Punitive damages may also, the law says, be awarded as a deterrent to others who may be inclined to act in a similar manner.

In arriving at the amount of actual damages, if any, in this case, you will be governed by the evidence as to what the evidence may reflect the plaintiff reasonably

suffered as a proximate consequence of the wrongful act of one or more of the defendants. In arriving at the amount of any punitive damage award that you may desire to make in this case, the law says that a jury has a discretion. It is not an arbitrary discretion; it's not an unbridled discretion -- but it is a discretion, as to what sum, in your judgment, will be adequate by way of punishment and be adequate by way of a deterrent. In arriving at the amount of punitive damages, if any, to be awarded in the case, due regard should be had to the enormity or not of the wrong and the necessity of preventing similar conduct and similar wrongs in the future.

In every lawsuit for damages -- and in every lawsuit of any kind, but we are engaged in the trial of a lawsuit in this instance for damages -- there is a burden of proof. There is a burden of proof in this case on the plaintiff, Jack Thompson. This burden or [sic] proof is as to each defendant before you can find a verdict in favor of Thompson and against one or more of the defendants. The burden is

on Jack Thompson in this case to prove every essential element of his case and to do so by a preponderance of the evidence. If the proof fails to establish any essential element of Jack Thompson's case by a preponderance of the evidence, then the law says you must find for the defendant. To establish by a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared to that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true.

The verdict to be rendered in this case must be a unanimous verdict. The six jurors to whom the case is submitted must each agree to the verdicts. You will find separate forms of verdicts, six of them; two for the defendant, Ray Bass, two for the defendant, Dan Turner, and two for the defendant, Mitchell Sexton. Any damages that are to be awarded in the case will be awarded against the defen-

dants, individually, and not in their official capacity as state officers. If, after you consider all of the evidence, after you determine what the true facts are, after you apply these legal principles to the facts, you find that the plaintiff, Jack Thompson, has sustained his burden of proof insofar as Ray D. Bass is concerned, then the form of your verdict will read, "We the jury find the issues in favor of the plaintiff and assess his damages at blank dollars." On the other hand -- I am repeating this for the purpose of impressing upon you; on the other hand, after you consider all of the evidence, after you determine what the true facts are, after you apply these legal principles, you find the plaintiff has failed to sustain the burden of proof, as I have outlined and defined that for you, insofar as Bass is concerned, the form of your verdict will be, "We the jury find the issues in favor of the defendant." The same is true as to the claim made against Turner; the same is true as to the claim made against Sexton. In either event, one of your number will sign a verdict as to

the claim made against Bass, will sign a verdict as to the claim made against Turner, will sign a verdict made as to the claim made against Sexton. Three separate verdicts. The defendants' liability is separate and not joint; liability, if any. Select one of your number to act as your spokesman to guide your deliberations and to sign the verdicts that represent the unanimous verdicts of the jury.

Now, I have two alternate jurors here. I do not want to excuse you yet, because I am going to send the jury to lunch before you start your deliberating. While you are out, you will be together from this point on. Do not discuss the case; do not permit anyone to talk to you about it. When you return from lunch, if the six regular jurors are here, the Clerk of the Court will excuse the alternate jurors; otherwise, the first alternate will step in, or the second, whatever the case may be. But after you go to the jury room, after you have had your lunch and go to the jury room, commence your deliberations. The Bailiff will have all of the exhibits there. Let me

know when you have reached your verdict. The Marshal will escort you to lunch.

UNITED STATES DISTRICT COURT
FOR
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JACK THOMPSON	)	CIVIL ACTION
	)	NO. 76-269-N
VS.	)	
	)	F I L E D
	)	10:05
DAN H. TURNER,	)	OCT 21 1976
Assistant Director,	)	
	)	JANE P. GORDON, CLERK
State Highway	)	BY /s/ RL ML
	)	DEPUTY CLERK
Department	)	

We, the Jury, find the issues in favor of the plaintiff and assess his damages at $20,000.

This the 21 day of October, 1976.

/s/ William M. Parker, III
Foreman

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA,

NORTHERN DIVISION

JACK THOMPSON, Plaintiff, v. DAN H. TURNER, Assistant Director, State Highway Department; et al., Defendants.	CIVIL ACTION NO. 76-269-N F I L E D OCT 21 1976 JANE P. GORDON, CLERK /s/ ML DEPUTY CLERK

JUDGMENT

On the 21st day of October, 1976, after this cause had been submitted to a jury, a verdict was returned by said jury as follows:

> "We, the Jury, find the issues in favor of the plaintiff and assess his damages at $20,000.
>
> "This the 21 day of October, 1976.
>
> /s/ William M. Parker, III
> Foreman"

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that the plaintiff, Jack Thompson, have and recover of the defendant,

Dan H. Turner, Assistant Director, State Highway Department, the sum of $20,000.

It is further ORDERED that the costs incurred in this proceeding be and the same are hereby taxed against the defendant Turner, for which execution may issue.

Done, this the 21st day of October, 1976.

/s/ Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

JACK THOMPSON, Plaintiff, vs. RAY D. BASS, Director, State Highway Department, et al., Defendants.	CIVIL ACTION NO. 76-269-N F I L E D OCT 29 1976 JANE P. GORDON, CLERK /s/ ML DEPUTY CLERK

MOTION FOR NEW TRIAL AND/OR
JUDGMENT NOTWITHSTANDING THE VERDICT

Defendant Dan Turner moves the Court for a new trial or in the alternative for judgment notwithstanding the verdict herein, which such verdict was rendered on October 21, 1976, and assigns as grounds therefor the following:

1. The Trial Court erred in failing to grant the defendant's motion to dismiss the plaintiff's complaint.

2. The Trial Court erred in denying the defendant's motion for directed verdict made at the close of all the evidence.

3. The Trial Court erred in charging the jury that the plaintiff had a "tenured employ-

ment" with the State of Alabama, to which the defendant duly objected before the jury retired.

4. The Trial Court erred in instructing the jury that the plaintiff had a right not to be deprived of his tenured employment with the State of Alabama without due process of law to which the defendant duly objected before the jury retired.

5. The Trial Court erred in charging the jury in effect, that the defendant could be found liable to the plaintiff if the defendant acted arbitrarily, capaciously [sic] and in bad faith to deprive the plaintiff of his tenured employment with the State of Alabama, to which the defendant duly objected before the jury retired.

6. The verdict of the jury is contrary to and not supported by the preponderance of the evidence.

/s/ Robert S. Lamar, Jr.
Robert S. Lamar, Jr.
Attorney for Defendant,
Dan Turner

Ball, Ball, Matthews and Lamar
200 South Lawrence Street
Montgomery, Alabama 36104
(205) 834-7680

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document on the attorney of record for each party to this cause by mailing a copy thereof, postage prepaid, to them at their respective addresses on this 29 day of Oct 19 76

/s/ Robert S. Lamar, Jr.
of counsel

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA,

NORTHERN DIVISION

JACK THOMPSON, Plaintiff, v. RAY D. BASS, Director, State Highway Department; et al., Defendants.	)	CIVIL ACTION NO. 76-269-N F I L E D NOV 15 1976 JANE P. GORDON, CLERK /s/ ML DEPUTY CLERK

O R D E R

The motion of the defendant Dan Turner filed herein October 29, 1976, seeking a new trial or, in the alternative, judgment notwithstanding the verdict, is ORDERED to be and is hereby denied.

Done, this the 15th day of November, 1976.

/s/ Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

Jack THOMPSON, Plaintiff-Appellee,

v.

Ray D. BASS, etc., et al., Defendants,

Dan H. Turner, etc.,
Defendant-Appellant.

Nos. 76-4475, 77-2292

United States Court of Appeals,
Fifth Circuit.

May 14, 1980.

Rehearing Denied June 16, 1980.

Appeals from the United States District Court for the Middle District of Alabama.

Before AINSWORTH and VANCE, Circuit Judges, and BOOTLE, District Judge */.

VANCE, Circuit Judge:

In this 42 U.S.C. § 1983 1/ action, the jury awarded Jack Thompson, a former Alabama Highway Department pilot damages in the amount of $20,000 for deprivation of his constitu-

---

*/ District Judge of the Middle District of Georgia, sitting by designation.

1/ Section 1983 provides,

tional rights under the first and fourteenth amendments by Dan H. Turner, assistant highway director. In addition, the trial court awarded Thompson $8,000 in attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Turner appeals both judgments. We conclude that because of the insufficiency of the evidence against Turner, the trial court erred in failing to grant Turner's motion for a directed verdict or judgment notwithstanding the verdict and in awarding attorneys' fees.

I.

In 1968, Thompson became a pilot in the aviation section of the Alabama Highway Department. He received permanent pilot II classifi-

---

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

under the state merit system on March 19, 1971. Thompson served as the aviation section's chief pilot,[2/] supervising and directing the activities of the section's other pilots, from September 22, 1971, until March 1973.

In November 1972, the secretary for Ray D. Bass, the Alabama highway director, telephoned Thompson and told him to bring the section's flight records to Bass' office to show a Birmingham News reporter whatever he requested. The reporter sought information about flights by Harry Pennington, the executive secretary to Governor Wallace. Thompson disclosed and explained the pertinent records and answered related questions. On November 19, 1972, the Birmingham News ran an article describing Pennington's use of state planes for personal business. Thompson subsequently acknowledged that he was the unidentified pilot who was quoted as expressing displeasure with

---

2/ The position of chief pilot is not a special merit position under Alabama law.

Pennington's conduct.

In December 1972, one month after the Birmingham News article appeared, Turner became the assistant highway director. Turner suggested to Bass that Thompson be replaced as chief pilot. Other pilots in the section also voiced their dissatisfaction with Thompson's continued tenure as chief pilot. Although Thompson had received two excellent efficiency reports from his predecessor, the other pilots questioned his flying and administrative abilities, his capacity to deal effectively with his coworkers, and his tendency not to schedule himself enough flights. The pilots presented their grievances to Bass during two meetings in March 1973. Bass then relieved Thompson of his position as chief pilot. Bass testified that morale and administrative concerns, not flying ability, were the bases for his action.

Turner and Bass held a meeting of all state pilots shortly thereafter. Thompson left this meeting believing that operating procedures had been changed so that pilots were not to report daily to the hangar but were to

remain at home on call. Consequently, Thompson ceased going to the hangar except to pilot pre-scheduled flights. At approximately the same time, all locks to the hangar and the office area where the flight status board was situated were changed. All pilots, except Thompson, received new keys. Turner acknowledges that he ordered keys to be withheld from Thompson because he was suspected of having stolen various items from these facilities. Unlike the other pilots, Thompson was denied a mail basket and a telephone credit card, was not allowed to attend flight schools or seminars, and was not notified of pilots' meetings. Despite these incidents, Thompson continued flying state planes until his discharge. At no time during this period was Thompson told that his ability was deficient.

With the approval of Bass, Turner wrote Thompson, on September 24, 1975, dismissing him from his permanent merit system position of pilot II effective October 1, 1975. The letter stated four ostensibly legitimate reasons for

the discharge. 3/ Thompson appealed his dismissal to the Alabama Personnel Board on October 6, 1975. After a full hearing that board found Thompson had been wrongfully terminated from his job, because the evidence was not sufficient to sustain Turner's charges against Thompson. It reinstated Thompson to his pilot II position with full back pay on April 1, 1976.

After his reinstatement, Thompson claims to have been ostracized by his coworkers and treated differently from the other pilots. He was denied a state car, telephone and gasoline

---

3/ Dear Mr. Thompson:
For the past two years, we have closely reviewed your performance as a Pilot II. This performace [sic] has been lacking greatly compared with other pilots in the professional aviation field. [1] You are apparently unsure of your ability to perform in instrument conditions, evidenced by the fact that you have cancelled several trips during this period which were made by other pilots with less experience.
There have been numerous complaints from several cabinet members, members of the Governor's Staff and Highway Department officials concerning your cancellation of flights when weather conditions would have permitted the flights to be made with normal

credit cards, a personal signaling device, and a key to the office, although he was given a hangar key. He resigned for these reasons on April 12.

Three months later Thompson instituted this section 1983 action against Governor Wallace, Bass, Turner, Senior Pilot Mitchell Sexton, and C. W. Anderson, a member of the state personnel board. All defendants filed motions to dismiss. The district court entered summary judgment in favor of Governor Wallace, but denied the motions of the other defendants on the condition that Thompson amend his complaint to specify the particular acts charged against each defendant. In his

---

instrument procedures.
[2] Also, your lack of interest and dedication to your job has been very evident during this period. As long as State pilots are flying regularly during odd hours, it is not expected that they be present on the job from 8 A.M. to 5 P.M. each day, but when their schedule allows they should be present in their office during these hours. During this period you have not reported for work except for an occassional [sic] flight. Also, it has been very difficult, if not impossible to reach you by telephone on

amended complaint, Thompson charged the remaining defendants individually and jointly with punishing him for exercising his first amendment rights and with depriving him of his position without due process of law.

The case was tried before a jury in October 1976. When Thompson finished presenting his evidence, the court granted C. W. Anderson a directed verdict, but denied the other defendants' motions for directed verdicts. The jury subsequently found that Bass and Sexton were not liable to Thompson, and returned a $20,000 verdict against Turner. Turner filed a motion for a new trial or judgment notwithstanding the verdict, which the court denied. On Thompson's

---

several different occasions when your flying services were desperately needed.
[3] Recently, on three different occasions, when instrument conditions were prevalent you obtained the services of a pilot that was not employed by the State to accompany you and aid you in your instrument operating procedures. This is very irregular and magnifies the fact that you are unsure of your ability to operate in instrument conditions. All pilots, especially State pilots which are constantly transporting high level State officials, must have abso-

motion, the court awarded him attorneys' fees of $8,000 to be paid by Turner.

Turner appeals the jury's verdict and the award of attorneys' fees. He argues that Thompson did not state a claim on which section 1983 relief could be granted and that Thompson's evidence was not sufficient to support the jury's verdict. We reverse. Thompson's amended complaint adequately stated a claim under section 1983, but Thompson's proof was not sufficient to establish Turner's liability.

II.

A complaint should not be dismissed under Fed.R.Civ.P. 12(b)(6) for failure to state a claim "unless it appears beyond doubt that the

---

lute confidence in their flying ability in order to operate the aircraft safely and to inspire pilot-confidence with the passengers.
[4] A Pilot II position requires that a pilot operate complex multi-engine aircraft. With your lack of confidence in the small twin-engine Aztec, it has been impossible for you to transition into the multi-engine turbo-prop Aero Commander 690A. Also, the State Highway Department supplies one crew member for the Alabama Development Office

plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). Accord, Cruz v. Skelton, 543 F.2d 86, 88 (5th Cir. 1976), cert. denied, 433 U.S. 911, 97 S.Ct. 2980, 53 L.Ed.2d 1096 (1977); Cook & Nichol, Inc. v. Plimsoll Club, 451 F.2d 505, 506-07 (5th Cir. 1971). To be entitled to section 1983 relief, a plaintiff must prove that (1) a defendant acting under color of state law (2) deprived him of a constitutionally protected right. Adickes v. S. H. Kress & Co., 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142 (1970), Smith v. YMCA of Montgomery, Inc., 462 F.2d 634, 647 (5th Cir. 1972). Turner does not dispute that, as Ala-

---

Jet Commander. Of course, not being able to transition into the turbo-prop, it has also been impossible for you to safely perform as a crew member on the Jet Commander. It is imperative that all Pilot II's be capable of safely performing in all aircraft.
Due to your inability to perform the duties of a Pilot II, it is with regret that we

bama's assistant highway director, he acted under color of state law. In his rather jumbled complaint Thompson alleged that Turner deprived him and conspired to deprive him of several rights secured by the first amendment and the due process clause of the fourteenth amendment. Some, but not all, of Thompson's allegations would, if proved, have entitled him to relief.

Thompson primarily claimed that Turner, conspiring with the other defendants, ostracized him by denying him certain job privileges given the other pilots, relieved him of his duties as chief pilot, relegated him to a subordinate position among pilots in the highway department, then dismissed him to punish him for giving information to the Birmingham News reporter. After his reinstatement, Thomp-

---

terminate you from this position effective October 1, 1975.

Yours very truly,
/s/ Dan H. Turner
Dan H. Turner
Assistant Highway Director

son asserts, Turner and the other defendants forced him to resign by their continued harassment for the same reason. An action for damages under section 1983 can clearly be based on a claim that a person acting under color of state law denied a claimant rights guaranteed by the first amendment, applied to the states through the fourteenth amendment. Moreno v. Henckel, 431 F.2d 1299, 1305 (5th Cir. 1970). Thompson would thus have been entitled to relief had he proved his allegation that Turner discharged him or forced him to resign to punish him for exercising his first amendment right of free speech, and the court properly denied Turner's motion to dismiss Thompson's first amendment claim. See Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972); Stewart v. Bailey, 556 F.2d 281, 284 (5th Cir. 1977); Rainey v. Jackson State College, 435 F.2d 1031, 1034-35 (5th Cir. 1970).

In his complaint, Thompson also asserted that, in dismissing him and forcing him to resign, Turner and the other defendants violated

the procedural and substantive due process guarantees of the fourteenth amendment. See generally Bowling v. Scott, 587 F.2d 229, 231 (5th Cir.), cert. denied, ____ U.S. ____, 100 S.Ct. 69, 62 L.Ed.2d 45 (1969); Stapp v. Avoyelles Parish School Board, 545 F.2d 527, 534 (5th Cir. 1977); Ferguson v. Thomas, 430 F.2d 852, 857-59 (5th Cir. 1970). Unlike the first amendment guaranty, which applies regardless of the claimant's interest in his or her state job, Mt. Healthy City School District v. Doyle, 429 U.S. 274, 283-84, 97 S.Ct. 568, 574, 50 L.Ed.2d 471 (1977), a claimant ordinarily [4/] is not entitled to procedural and substantive due process when his or her state employment is terminated unless he or she has a property

---

4/ Because Thompson had a protected property interest in his state job, we do not decide whether this property interest was essential to his claim that his reputation was damaged in the course of his dismissal. Compare Paul v. Davis, 424 U.S. 693, 710-12, 96 S.Ct. 1155, 1164-64, 47 L.Ed.2d 405 (1976) with Robison v. Wichita Falls & North Texas Community Action Corp., 507 F.2d 245, 252 (5th Cir. 1975).

interest in continued employment. See Bishop v. Wood, 426 U.S. 341, 350, 96 S.Ct. 2074, 2080, 48 L.Ed.2d 684 (1976); Megill v. Board of Regents, 541 F.2d 1073, 1081 (5th Cir. 1976). Turner contends that Thompson did not have a property interest in his job, thus that he was not entitled to due process protection. We disagree.

Alabama state law created Thompson's "legitimate claim of entitlement" to his continued state employment. Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). 5/ See generally Bishop v. Wood, 426 U.S. at 344, 96 S.Ct. at 2077 (no entitlement under state law); Goss v. Lopez, 419 U.S. 565, 572-73, 95 S.Ct. 729, 735, 42 L.Ed.2d 725 (1975) (entitlement under either

---

5/ To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbi-

state law or rules promulgated by state officials); Perry v. Sindermann, 408 U.S. at 599-603, 92 S.Ct. at 2698-2700 (entitlement under mutually explicit understanding of the parties). The provisions of the Alabama Merit System Act, sections 36-26-1 through 36-26-47 of the Code of Alabama (1975), and the rules adopted by the personnel board pursuant to the Act establish that Thompson had a protected property interest in his position as a pilot with the Alabama Highway Department. See United Steelworkers v. University of Alabama, 599 F.2d 56, 60 (5th Cir. 1979). The statute that controls dismissals and discipline proceedings, section 36-26-27 of the Code of Alabama, provides in pertinent part, "[a]n appointing authority may dismiss a classified employee whenever he considers the good of the

---

trarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Board of Regents v. Roth, 408 U.S. at 577, 92 S.Ct. at 2709.

service will be served thereby . . .." Rule XII, section 2(a), of the Rules of the Personnel Board provides, "The appointing authority may remove any permanent employee of the classified service for cause only."

Turner relies on Simpson v. Van Ryzin, 289 Ala. 22, 265 So.2d 569 (1972), in which the Supreme Court of Alabama construed the relevant provisions of Alabama law. The court observed, "A public office which the legislature creates is not the property of the office holder within the constitutional provision against depriving a man of property, nor does it ever become a vested right as against the right of the state to remove him." 289 Ala. at 28, 265 So.2d at 573. Turner argues that this decision compels us to find that Thompson did not have a constitutionally protected property interest in his state job.

Although a state court may define the interest state law has given a public employee in his or her state job, we are not bound to follow the portions of the state court's decision in which the court purports to deter-

mine whether the interest created by state law is protected by the federal constitution. "While the State may define what is and what is not property, once having defined those rights the Constitution defines due process . . .." Arnett v. Kennedy, 416 U.S. 134, 185, 94 S.Ct. 1633, 1660, 40 L.Ed.2d 15 (1974) (White, J., concurring in part and dissenting in part), quoted in Thurston v. Dekle, 531 F.2d 1264, 1271 (5th Cir. 1976), vacated and remanded on other grounds, 438 U.S. 901, 98 S.Ct. 3118, 57 L.Ed.2d 1144 (1978) (for consideration in light of Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (six members of Supreme Court agree with quoted holding). A state employee that may be discharged at will under state law has no property interest in his or her job, but a state employee whose employment may be terminated only for cause has a property interest in the state employment and is entitled to due process protection. Bishop v. Wood, 426 U.S. at 345 & n.8, 96 S.Ct. at 2077, n.8; Thurston v. Dekle, 531 F.2d at 1272. Ala-

bama law authorizes a state employee's discharge only for cause. Simpson v. Van Ryzin, 289 Ala. at 30-31, 265 So.2d at 575-76; Code of Ala. § 36-26-27 (1975); Rule XII, § 2(a), Rules of the Personnel Board. Alabama law therefore gave Thompson a constitutionally protected entitlement to continue public employment.

Thompson alleged that in three different ways Turner and the other defendants denied him the procedural due process to which he was entitled. We, however, find that Thompson's allegations on this issue, even if proved, would not have entitled him to relief.

First, Thompson claimed that Turner, who used procedures authorized in section 36-26-27 of the Code of Alabama, deprived him of constitutionally adequate process by dismissing him without pretermination notice and an opportunity to be heard. Turner's September 1975 letter notifying Thompson of his dismissal certainly did not meet the minimum requirement of due process outlined in Thurston v. Dekle, 531 F.2d at 273. See generally, Davis v. Vandiver,

494 F.2d 830, 832-33 (5th Cir. 1974). These minimally adequate procedures include, "prior to termination, written notice of the reasons for termination and an effective opportunity to rebut those reasons." Glenn v. Newman, 614 F.2d 467, 472 (5th Cir. 1980). See also, Bell v. Burson, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90 (1971); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950). Thompson's allegations, however, show that he received a full posttermination hearing before the Alabama Personnel Board, was reinstated, and received full back pay. In Glenn v. Newman, 614 F.2d at 472, Judge Frank M. Johnson, Jr., writing for another panel of this court, found that, although the pretermination procedures afforded a dismissed public employee with a property interest in his job were constitutionally inadequate, the error was cured by subsequent posttermination proceedings that included written notice of the charges and a public hearing during which the employee was represented by an attorney, presented wit-

nesses, and cross-examined opposing witnesses. See also, Blair v. Robstown Independent School District, 556 F.2d 1331, 1334-35 (5th Cir. 1977). The court found that the employee was entitled only to back pay due for the period between his dismissal and his posttermination hearing. Glenn v. Newman, 614 F.2d at 473. Because in Thompson's case, unlike Glenn v. Newman, the posttermination hearing panel reinstated Thompson and awarded him back pay, we find that the constitutional inadequacy of the pretermination proceedings was cured and that Thompson was not entitled to additional relief based on these allegations.

Second, Thompson asserted that in dismissing him, Turner damaged his reputation and his ability to find another position as a pilot without fourteenth amendment due process. To obtain relief based on this allegation, Thompson was required to establish "that in the course of terminating his employment, [Turner] prepared a report, without giving him notice and an opportunity to be heard which was

(a) false, (b) stigmatizing, and (c) published." 6/ Huffstutler v. Bergland, 607 F.2d 1090, 1092 (5th Cir. 1979) (footnotes omitted). See Codd v. Velger, 429 U.S. 624, 628, 97 S.Ct. 882, 884, 51 L.Ed.2d 92 (1977) (false); Bishop v. Wood, 426 U.S. at 348-49, 96 S.Ct. at 2079 (published); Paul v. Davis, 424 U.S. 693, 710, 96 S.Ct. 1155, 1164, 47 L.Ed.2d 405 (1976) (in the course of terminating employment); Board of Regents v. Roth, 408 U.S. at 573, 92 S.Ct. at 2707 (stigmatizing). Thompson alleged that the charges contained in Turner's dismissal letter were false and stigmatizing and that the letter was published; however, Thompson's allegations show that he received an adequate posttermination hearing after which his reputation was vindicated and Turner reinstated him in his job. We, therefore, find that the constitutional error in the procedures employed by Turner was cured in the subsequent proceedings. 7/

6/ See note 4 supra.

7/ On Thompson's failure to prove his claim

See Bishop v. Wood, 426 U.S. at 350-53, 96 S.Ct. at 2080-81 (Brennan, J., dissenting).

Third, Thompson claimed that Turner denied him procedural due process by failing to follow procedures required by Alabama law in discharging him. Section 36-26-22 of the Code of Alabama directs appointing authorities to report employees' service ratings to the director regularly and provides that employees "shall be given reasonable opportunity to inspect the records of the department which show his service ratings." Thompson alleged that Turner did not give him the required regular service ratings. Service ratings, however, are not listed as a prerequisite to dismissal under section 36-26-27 of the Code of Alabama which governs "Dismissals and disciplining of employees generally." We find that this alleged violation of state law does not rise to the level of a constitutional deprivation; therefore, it,

---

that Turner denied him due process by forcing him to resign and by injuring his reputation after his reinstatement, see section III infra.

like Thompson's other procedural due process claims, does not entitle him to relief under section 1983. See Miller v. Carson, 563 F.2d 757, 760 n.7 (5th Cir. 1977).

Finally, Thompson claimed that Turner denied him and conspired to deny him substantive due process because Turner's decision to dismiss Thompson was made arbitrarily, capriciously, and maliciously and was based on information that Turner knew was false. This claim, like Thompson's first amendment claim, was based primarily on his allegation that Turner discharged him, then harassed him into resigning after his reinstatement for an impermissible reason, as punishment for having given information to the Birmingham News reporter, rather than for a legitimate one. In Bishop v. Wood, a section 1983 case in which the discharged public employee did not have a property interest in his state job, the Supreme Court cautioned,

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous indi-

> vidual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

426 U.S. at 349-50, 96 S.Ct. at 2080. Unlike Bishop, however, Thompson had a property interest in his state employment and asserted that his employer, Turner, was motivated by a desire to retaliate for Thompson's exercise of his first amendment rights. See Ferguson v. Thomas, 430 F.2d at 857. We therefore find that, if proved, this claim would have entitled Thompson to recover under section 1983. See generally Thompson v. Gallagher, 489 F.2d 443, 446-47 (5th Cir. 1973); Buhr v. Buffalo Public School District, 509 F.2d 1196, 1200-02 (8th Cir. 1974); Jeffries v. Turkey Run Consolidated School District, 492 F.2d 1, 4-5 & n.12 (7th Cir. 1974).

III.

The jury found Turner liable to Thompson on his section 1983 claims. The court then denied Turner's motion for a judgment notwithstanding the verdict or a new trial. In evaluating the grant or denial of a judgment notwithstanding the verdict, we are governed by the standards established in Boeing Company v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc). Our task is not to reweigh the evidence to reach our own conclusions about the correctness of the jury's decision; "[r]ather, Boeing requires us to determine whether reasonable men could, under any theory submitted to the jury, have resolved the dispute as the jury did." Crowe v. Lucas, 595 F.2d 985, 989 (5th Cir. 1979). Because Thompson did not prove that Turner deprived him of his first amendment rights or of substantive due process, we find that the court erred in upholding the jury's verdict.

To have found Turner liable on Thompson's first amendment theory, the jury was required to have determined (1) that Thompson's discus-

sion with the Birmingham News reporter was a substantial or motivating factor in Turner's decision to dismiss Thompson, to conspire to dismiss him, or to force him to resign, and (2) that Turner would not have terminated Thompson, conspired to terminate him, or forced him to resign had Thompson not given information to the reporter. See Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. at 287, 97 S.Ct. at 576; Goss v. San Jacinto Junior College, 588 F.2d 96, 99 (5th Cir.), modified on other grounds, 595 F.2d 1119 (5th Cir. 1979); Hastings v. Bonner, 578 F.2d 136, 141 (5th Cir. 1978). 8/ The evidence produced at trial, however, showed that Turner became assistant director after the publication of the Birmingham News story. He was not shown to have known about the article until Thompson's case was considered by the personnel board, more than three years after

---

8/ The distinction between the conjunctive requirements is somewhat obscure.

the article's publication. Because no evidence demonstrated Turner's exposure to the article or its contents, Thompson did not show that his interview with the reporter substantially motivated Turner's decision to dismiss him or that Turner would not have discharged him had Thompson not given information to the reporter.

Thompson not only did not show that his conversation with the reporter was a substantial factor in his ostracism after his reinstatement, but he also did not demonstrate that Turner authorized, caused, or conspired to cause the disparate treatment that, he claims, forced his resignation. Although Thompson was treated differently from the other pilots during his brief return, the evidence did not reveal that the difference was caused by anything other than time, administrative difficulties, and, perhaps, the hostility of his immediate coworkers. The jury may have blamed Turner for Thompson's ostracism because Turner was in charge of personnel. An official's liability under section 1983, however, may not be based on respondeat superior or vicarious lia-

bility. Monell v. Department of Social Services, 436 U.S. 658, 664 n.7, 98 S.Ct. 2018, 2022 n.7, 56 L.Ed.2d 611 (1978); Baskin v. Parker, 602 F.2d 1205, 1208 (5th Cir. 1979). Thompson failed to show that Turner's actions after Thompson's reinstatement "caused a constitutional violation." Baskin v. Parker, 602 F.2d at 1208. See generally Henzel v. Gerstein, 608 F.2d 654, 658 (5th Cir. 1979). Similarly, the evidence does not show that Turner agreed or conspired with anyone to dismiss Thompson or to force him to resign because he gave information to the Birmingham News reporter. See Crowe v. Lucas, 595 F.2d at 993.

Because Thompson did not show that Turner discharged him or conspired to discharge him for exercising his first amendment rights, he also failed to prove his substantive due process claim which, like his first amendment claim, was based primarily on his factual allegation that Turner discharged him because he talked to the Birmingham News reporter. See generally Cook v. Whiteside, 505 F.2d 32, 34 (5th Cir. 1974) (allegation of arbitrary and

capricious action must be supported by facts). Thompson did not demonstrate that Turner knew or suspected that the evidence of Thompson's airborne shortcomings was false or that Turner's charges that Thompson was unable to fly safely and confidently were unreasonable. Thompson thus did not establish that Turner's decision to dismiss him was arbitrary, capricious, and motivated by a desire to penalize him for exercising his constitutionally protected rights.

In view of Thompson's failure to prove that Turner deprived him or conspired to deprive him of his first amendment rights or of substantive due process, reasonable persons could not have returned a verdict against Turner on either of the theories properly submitted to the jury. We therefore find that the district court erred in failing to grant Turner's motion for judgment notwithstanding the verdict and in awarding Thompson attorneys' fees to be paid by Turner.

REVERSED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NOS. 76-4475 and
77-2292

COURT OF APPEALS
F I L E D
JUN 16 1980
GILBERT F. GANUCHEAU
CLERK

JACK THOMPSON,

Plaintiff-Appellee,

versus

RAY D. BASS, Etc., ET AL.,

Defendants,

DAN H. TURNER, Defendant-Appellant.

- - - - -

Appeal from the United States District Court
for the Middle District of Alabama

- - - - -

ON PETITION FOR REHEARING

(June 16, 1980)

Before AINSWORTH and VANCE, Circuit Judges, and BOOTLE,* District Judge.

---

*/ District Judge from the Middle District of Alabama, sitting by designation

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-4475

FILED
June 25 12:35 PM 1980
JANE P.GORDON CLERK
U.S.DISTRICT COURT
MIDDLE DISTRICT OF ALA.
/s/ LMG
DEPUTY CLERK

D. C. Docket No. CA-76-269-N

JACK THOMPSON

Plaintiff-Appellee,

versus

RAY D. BASS, Etc., ET AL.,

Defendants,

DAN H. TURNER,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Alabama

Before AINSWORTH and VANCE, Circuit Judges,
and BOOTLE, District Judge*

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this

*/ District Judge from the Middle District of Georgia, sitting by designation

cause be, and the same is hereby, reversed;

It is Further ordered that plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

May 14, 1980

Issued as Mandate: June 24, 1980

A true copy

Test GILBERT F. GANUCHEAU
Clerk,U.S. Court of
Appeals, Fifth Circuit

By:/s/ Shelda Harris
Deputy

New Orleans, Louisiana

June 24, 1980

Supreme Court, U. S.
FILED
OCT 15 1980
MICHAEL RODAK, JR., CLERK

NO. 80-407

In the Supreme Court of the United States

OCTOBER TERM, 1980-1981

JACK THOMPSON,
PETITIONER-PLAINTIFF

VERSUS

DAN H. TURNER, ASSISTANT DIRECTOR,
ALABAMA STATE HIGHWAY DEPARTMENT,
RESPONDENT-DEFENDANT

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT DAN H. TURNER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUBMITTED BY:

ROBERT S. LAMAR, JR.
BALL, BALL, DUKE & MATTHEWS, P.A.
P.O. DRAWER 2148
MONTGOMERY, ALABAMA 36197
TELEPHONE (205) 834-7680

ATTORNEY OF RECORD FOR
RESPONDENT, DAN H. TURNER

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT. 1

ARGUMENT. 1

A. General Principles 1

B. Question 1: Damages after posttermination reinstatement 2

C. Question 2: The burden of proof 4

D. Question 3: The two separate claims 7

CONCLUSION 10

CERTIFICATE OF SERVICE. 11

TABLE OF AUTHORITIES

CASES CITED PAGE(S)

Boeing Company, Inc. v. Shipman, 411 F.2d 365 (5th Cir. 1969). 5,6

General Talking Pictures Corp. v. Western Electric Co., 305 U.S. 124, 83 L.Ed. 81, 59 S.Ct. 116, reh den 305 U.S. 675, 83 L.Ed. 437, 59 S.Ct. 355 1

McCullough v. Kammerer Corp., 323 U.S. 327, 89 L.Ed. 273, 65 S.Ct. 297 2

Michel v. Louisiana, 350 U.S. 91, 100 L.Ed. 83, 76 S.Ct. 158 2

Minnesota v. National Tea Co., 309 U.S. 551, 84 L.Ed. 920, 60 S.Ct. 676 1

Smith v. Vulcan Iron Works, 165 U.S. 518, 41 L.Ed. 810, 17 S.Ct. 407 1

Thompson v. Bass, 616 F.2d 1259 (5th Cir. 1980) 3,4,8

RULES CITED:

Rules of the Supreme Court of the United States, Rule 17 4,9

SUMMARY OF ARGUMENT

The questions for which Petitioner (hereafter referred to as "Thompson") seeks review have never been properly raised, litigated and passed upon by the courts below. Moreover, an answer to the questions presented is not necessary to a proper decision of the case and an answer will not affect the substantial rights of the parties.

ARGUMENT

A. *General Principles*

Turner believes that several general principles of law declared by this Court regarding its discretionary jurisdiction by way of certiorari are applicable to each of the three issues for which Thompson seeks review. These general principles are:

1. Certiorari will not issue to review a decision of a Court of Appeals where the matter complained of does not affect the substantial rights of the parties. *Smith v. Vulcan Iron Works*, 165 U.S. 518, 41 L.Ed. 810, 17 S.Ct. 407.

2. Certiorari will not issue to answer questions based upon a state of facts not present in the case or which are not necessary to a decision of the case. *General Talking Pictures Corp. v. Western Electric Co.*, 305 U.S. 124, 83 L.Ed. 81, 59 S.Ct. 355; *Minnesota v. National Tea Co.*, 309 U.S. 551, 84 L.Ed. 920, 60 S.Ct. 676.

3. Certiorari will not issue to consider questions which have not been properly raised, litigated and passed upon in the

lower courts. *McCullough v. Kammerer Corp.*, 323 U.S. 327, 89 L.Ed. 273, 65 S. Ct. 297.

4. Certiorari will not issue to consider claims not made out below. *Michel v. Louisiana*, 350 U.S. 91, 100 L.Ed. 83, 76 S.Ct. 158.

B. *Question 1: Damages after posttermination reinstatement.*

Thompson seeks to have this Court decide whether a claim for damages exists based upon a theory for which he did not seek damages in the Courts below.

Thompson concedes that while his complaint alleged facts concerning certain procedural deficiencies surrounding his termination of employment, such allegations were made to support a claim for damages based upon arbitrary and capricious treatment and that he made no claim at the trial court level for damages based upon *procedural* due process deprivations. 1

Thompson further agrees with Turner that the Court of Appeals mistakenly considered those allegations as attempting to state a claim for damages based upon a procedural due process denial. 2

When this case was tried in October, 1976, the trial court instructed the jury that Thompson could recover damages upon

---

1 Petition for Writ of Certiorari, p. 5, footnote 9.

2 Id.

proof of two separate theories of recovery:

(1) that Turner acted to punish Thompson for the exercise of his first amendment right, and

(2) that Turner arbitrarily and capriciously deprived him of his employment with the State.[3]

Thompson took no exception to the court's charge and asked for no charge concerning a claim for damages based upon a denial of procedural due process.[4]

Upon appeal from a jury verdict in favor of Thompson, Turner contended that Thompson's complaint failed to state a claim for relief.[5] Although the Court of Appeals mistakenly considered Thompson's complaint to attempt to state a claim for damages on procedural due process grounds, that Court's decision with respect to such a claim was unnecessary to a proper decision of the appeal. The Court of Appeals found that the evidence was insufficient to support the verdict on the two claims actually prosecuted by Thompson -- the first amendment claim and the substantive due process claim.

For this reason, it cannot be said that the Court of Appeals has "departed from the accepted and usual course of

---

[3] Record, pp. 920-937.

[4] Record, pp. 937-938.

[5] *Thompson v. Bass*, 616 F.2d 1259 (5th Cir. 1980) at p. 1263.

judicial proceedings." [6] Even if it did there was no injury to Thompson since he never asserted such a claim for damages in the first place.

In a similar vein, certiorari should not issue because of the applications of the general principles cited in Section A above. Thompson now seeks to have this Court answer whether he may maintain an action for damages upon a theory which he chose not to pursue in the lower courts, a theory of the case which was not properly raised, litigated and passed upon the Courts below. Moreover, an answer from this Court to the issue presented for review would not affect the substantial rights of the parties. Even if this Court were to hold that there is a viable procedural due process damage claim available in the context of the question presented, it would avail Thompson nothing since he has never made or prosecuted such a claim.

C. *Question 2: The burden of proof.*

The Court should decline certiorari on this issue for the same reasons. Indeed, there is no error in the record for the Court to review.

The question presented relates only to Thompson's substantive due process claim. That claim was that Turner's decision to dismiss Thompson was made arbitrarily, capriciously and maliciously and based on information that Turner knew was false. [7]

---

6 Rule 17.1(a), Rules of the Supreme Court of the United States.

7 *Thompson v. Bass, supra,* at p. 1267.

The trial court instructed the jury that Thompson had a constitutional quaranty not to be deprived of his tenured job by arbitrary and capricious action, and that Thompson had the burden of proving the essential elements of his case which were: (1) that the acts complained of were done under color of state law, (2) that the acts complained of must have caused the deprivation of a right secured by the Constitution, and (3) the acts complained of must have caused injury or damage. The Court also charged that Turner could not be held liable if he acted reasonably and in good faith. [8]

As mentioned previously, Thompson took no exceptions or objections to the court's charge.

Turner made no claim of error in the Court of Appeals with respect to the trial court's charge on burden of proof, nor did Thompson.

No issue regarding the burden of proof was presented before either the District Court or the Court of Appeals. There was nothing for the Court of Appeals to review in that regard.

Thompson has misconstrued the opinion of the Court of Appeals. That court was not presented with an issue regarding the burden of proof, but rather one of whether Turner's motion for judgement notwithstanding the verdict should have been granted. In evaluating that issue the Court of Appeals was governed by its decision in *Boeing Company v. Shipman*, 411

---

[8] Record, pp. 920-937.

F.2d 365 (5th Cir. 1969), under which the inquiry is whether, considering all the evidence, reasonable men could not have returned a verdict against Turner on the issues submitted to them.

The Court of Appeals, upon consideration of all the evidence given on both sides of the case, concluded that reasonable men could not on the basis of such evidence have returned a verdict against Turner. The language in the opinion that "Thompson failed to prove" in not, therefore, responsive to an issue of who had the burden of proof, but rather is indicative that from a consideration of all evidence given at trial the Court of Appeals concluded that "the facts and inferences point so strongly and overwhelmingly in favor of [Turner] that . . . reasonable men could not arrive at a contrary verdict." [9]

As neither the District Court nor the Court of Appeals has addressed the question sought to be reviewed, there is nothing for this Court to review.

Even if this Court were to answer the question that the burden was on Turner to prove that his actions were taken in good faith, the Court of Appeals decision would have to stand since under its standards it found from all the evidence presented by both sides that reasonable men could not have found against Turner.

---

9 *Boeing Company v. Shipman*, supra, at 374.

D. *Question 3: The two separate claims.*

The question as presented for review is one which, if properly before the Court, we would concede must be answered in the affirmative. However, this question, like the two questions previous, is not properly before the Court.

In the pretrial order entered in September, 1976, one month before trial, plaintiff's contentions were stated to be that as a result of his talking with *the Birmingham News* Reporter the defendants "embarked upon a scheme to arbitrarily and capriciously deny [him] his constitutional rights guaranteed to him by the FOURTEENTH AMENDMENT and to punish him for exercising his rights guaranteed to him by the FIRST AMENDMENT" and that in furtherance of such scheme defendants accorded him disparate treatment and concocted false charges of dismissal against him. 10

Thus it was Thompson's theory, not the theory of the District Court or the Court of Appeals, that the alleged disparate treatment and termination of employment based on false charges was based upon either a conspiracy to deprive him of his right to due process and/or a conspiracy to punish him for talking to the reporter.

Thompson tacitly concedes that the Court of Appeals may not be reversed for finding that he failed to prove his First Amendment theory. Rather, Thompson is now attempting to

---

10 Record, pp. 475-479.

change the nature of his substantive due process theory.

Thompson's substantive due process case as submitted to the jury was that Turner arbitrarily and capriciously terminated his employment with the State based upon known false charges. [11]

The question presented is not properly before this Court because:

(a) the Court of Appeals found that the evidence was insufficient to establish that Turner knew or suspected that the charges were false or unreasonable or that Turner's decision to dismiss him was arbitrary or capricious. [12] Such a finding necessarily resulted in a failure of the evidence to sustain Thompson's substantive due process claim, even without consideration of the allegation that Thompson's dismissal was motivated by a desire to punish for exercise of First Amendment rights;

(b) Thompson chose to allege as part of his contentions that the alleged arbitrary and capricious dismissal was because of a desire to punish for First Amendment reasons. [13] The Court of Appeals opinion merely recognizes that this was his contention and that it, too, was not proven. The opinion does not make punishment for exercise of First Amendment rights a condition precedent to recovery for violation of due process

---

[11] *Thompson v. Bass, supra,* at p. 1267.

[12] Id., at p. 1268.

[13] See Footnote, 10, *supra.*

rights. The opinion merely responded to Thompson's theory of the case;

(c) in his petition, Thompson has sought to change his substantive due process theory as presented at the District Court and Court of Appeals levels from one based upon arbitrary and capricious denial of employment to a more general one of "disparate treatment". [14] Why he chooses to do so we cannot imagine since this "disparate treatment" theory was not raised or litigated below other than in the context of being the alleged actions taken to punish for Thompson's exercise of First Amendment rights. Also, mere disparate treatment, regardless of how arbitrary or capricious, could never rise to the level of a deprivation of due process rights unless it amounted to either an injury to the "liberty" or "property" interests of the complaining party. Thompson has never claimed that the mere "disparate treatment" deprived him of his "liberty" or "property" interests.

Consequently, the Court of Appeals has not "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision" [15], but rather has only held that Thompson failed to prove his case in the context of his own theories and allegations. The Court of Appeals cannot be held in error for so doing.

---

[14] Petition for Writ of Certiorari, pp. 31-32.

[15] Rule 17.1(a), Rules of the Supreme Court of the United States.

CONCLUSION

For the foregoing reasons, Turner respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

/S/ Robert S. Lamar, Jr.
Robert S. Lamar, Jr.

BALL, BALL, DUKE & MATTHEWS, P.A.
P.O. Drawer 2148
Montgomery, Alabama 36197
Telephone (205) 834-7680

ATTORNEY OF RECORD FOR
RESPONDENT, DAN H. TURNER

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing brief upon Hon. Alvin T. Prestwood, P.O. Box 217, Montgomery, Alabama, 36101, Attorney of Record for Petitioner, by United States Mail, postage prepaid and properly addressed, on this the 14TH day of October, 1980.

/S/ Robert S. Lamar, Jr.
Robert S. Lamar, Jr.